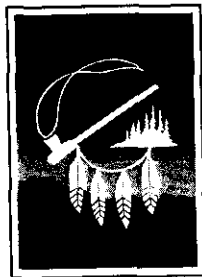


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**INDIAN CLAIMS COMMISSION PROCEEDINGS**

**SPECIAL ISSUE ON LAND CLAIMS REFORM**

A PUBLICATION OF  
**THE INDIAN CLAIMS COMMISSION**



[1995] 2 ICCP

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## FROM THE CO-CHAIRS

On behalf of the commissioners and staff of the Indian Claims Commission, we are pleased to present this second volume of the *Indian Claims Commission Proceedings*. Part of our mandate is to offer "advice and information" to the Joint Assembly of First Nations/Canada Working Group. The Joint Working Group on Specific Land Claims was set up to review and make recommendations on changing the land claims policy and process; a protocol describing its role was signed in July 1992, and its mandate expired in July 1993 with no agreement reached. Since that time there has been no special forum to discuss land claims issues, and no progress appears to have been made in reforming policy or process. The Commission is now in its fourth year of operation, and, as a result of the planning conferences, community sessions, and inquiries, we have acquired much valuable information and understanding of both policy and process. We should like to ensure that we all benefit from that knowledge.

In October 1993, a few months after the Joint Working Group's mandate expired, a new government was elected on a platform that included land reforms for First Nations. For many reasons, an opportunity now exists for a meeting of minds; therefore, this volume is devoted to the issue of land claims reform. We urge all to read and consider the material contained in these pages so that we can move on to new and workable solutions.

The issue begins with a paper prepared by the Commission which traces the path that has brought us where we are today. It sets out the historical background to land issues, describes the origins and activities of the Commission, and discusses the failure of the Joint Working Group to achieve its task. It is followed by independent papers written by lawyers Art Durocher and Mary Ellen Turpel for this Special Issue. They discuss the different processes available for settling land disputes, drawing on examples from different parts of the world, and the legal issues involved in the land claims process. We should like to thank Ms Turpel and Mr. Durocher for their contributions to this debate.

Reprinted in this issue are two other documents. The "Draft Recommendations Prepared by Neutral," dated June 25, 1993, sets forth the Joint Working Group's discussions and indicates where and how the parties disagreed. The "Discussion Paper Regarding First Nation Land Claims," dated 24 September 1990, was prepared by the Indian Commission of Ontario and it sets out the issues at that time.

Much discussion concerning the reform of the Specific Claims Policy has taken place over recent years; little of fundamental importance has been accomplished. We hope that these materials will promote a resumption of debate, and debate at a knowledgeable and useful level. There is an urgent need for reform of the Specific Claims Process to provide a fair and accountable land claims process for First Nations and indeed for all Canadians.

Daniel J. Bellegarde  
Co-Chair

P.E. James Prentice, QC  
Co-Chair

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## ABBREVIATIONS

AC	Law Report Appeal Cases (Eng.)
AFN	Assembly of First Nations
AIAI	Association of Iroquois and Allied Indians
ALR	Australian Law Review
Alta L.R.	Alberta Law Reports
Alta L. Rev.	Alberta Law Review
BCJ	British Columbia Judgments
BCLR	British Columbia Law Reports
BCSC	British Columbia Supreme Court
CA	Court of Appeal
Can. Bar Rev.	Canadian Bar Review
Can. J. Law & Jur.	Canadian Journal of Law and Jurisprudence
CBA	Canadian Bar Association
CBAO	Canadian Bar Association of Ontario
CCC	Canadian Criminal Cases
CHRYB	Canadian Human Rights Year Book
CJC	Chief Justice of Canada
CLR	Commonwealth Law Reports (Aus.)
CNLC	Canadian Native Law Cases
CNLR	Canadian Native Law Reporter
DIAND	Department of Indian Affairs and Northern Development
DLR	Dominion Law Report
ETR	Estates and Trusts Reports
FC	Canada Federal Court Reports
FCA	Federal Court Appeal Division
FCJ	Federal Court Judgments
FCTD	Federal Court Trial Division
Fed. L. Rev.	Federal Law Review
FG	Federal Government
FN	First Nations
FTR	Federal Trial Reports
Georgia L. Rev.	Georgia Law Review
Harv. L. Rev.	Harvard Law Review
ICC	Indian Claims Commission
ICCP	Indian Claims Commission Proceedings
ICO	Indian Commission of Ontario
JWG	Joint Working Group
L. Soc. Gaz.	Law Society Gazette (Law Society of Upper Canada)

## ABBREVIATIONS

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L.Ed.	Lawyer's Edition Supreme Court Reports (U.S.)
LJPC	Law Journal Reports, Privy Council (Eng.)
LT	Law Times Reports
McGill L.J.	McGill Law Journal
NA	National Archives of Canada
New York Univ. L. Rev.	New York University Law Review
New Zealand Univ. L. Rev.	New Zealand University Law Review
North Dakota L. Rev.	North Dakota Law Review
NR	National Reporter
NWT Terr. Ct.	Northwest Territories Territorial Court
Ohio State L.J.	Ohio State Law Journal
ONC	Office of Native Claims
OR	Ontario Reports
Osgoode Hall L.J.	Osgoode Hall Law Journal
Ottawa L. Rev.	Ottawa Law Review
PC	Privy Council
Queen's L.J.	Queen's Law Journal
RSC	Revised Statutes of Canada
Sask. L. Rev.	Saskatchewan Law Review
Sask. R.	Saskatchewan Reports
SCC	Supreme Court of Canada
SCR	Canada Supreme Court Reports
TARR	Treaty and Aboriginal Rights Research Centre
TD	Trial Division
TLR	Law Times Reports
UBC L. Rev.	University of British Columbia Law Review
UCLA L. Rev.	University of California at Los Angeles Law Review
Univ. of W. Aust. L. Rev.	University of Western Australia Law Review
UOI	Union of Ontario Indians
USR	United States Reports
USSC	United States Supreme Court
UTLJ	University of Toronto Law Journal
UWO L. Rev.	University of Western Ontario Law Review
Wash. L. Rev.	Washington Law Review
WWR	Western Weekly Reports
Yale L.J.	Yale Law Journal
YJ	Yukon Judgments

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**SPECIAL ISSUE ON LAND CLAIMS REFORMS**

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**A FAIR AND  
EQUITABLE PROCESS**

**A DISCUSSION PAPER ON  
LAND CLAIM REFORM**

**PREPARED BY THE  
INDIAN CLAIMS COMMISSION**

**SEPTEMBER 1994**



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## INTRODUCTION

This discussion paper is meant to stimulate discussion. The Indian Claims Commission is concerned that, since the mandate of the Joint Working Group (JWG) of the Assembly of First Nations and the federal government expired in July 1993, no specialized forum has existed for First Nations and Canada to discuss the reform of land claims policies and processes. As a result, little progress has been made on these issues for some time.

In an attempt to revive serious consideration of these critical issues, we have commissioned two papers on land claims reform, one from Mary Ellen Turpel and one from Art Durocher. Both papers are included in this volume of the *Proceedings*, along with critical background material: the Indian Commission of Ontario's 1990 *Discussion Paper Regarding First Nations Land Claims*, and Neutral's Draft Recommendations from the JWG. The 1990 *First Nations Submission on Claims* was reprinted in volume 1 of the *Proceedings*.

This Commission has a mandate at present to provide advice and guidance to Canada and First Nations on how to reform and improve the existing system. In our view, we can assist Canada and First Nations in the land claims reform process by facilitating negotiations, providing advice based on our experience to date, and by mediating when and if required. If we are to avoid further violence and bloodshed over unsettled land claims in Canada, we must act now, *before* the next confrontation.

# PART I

## BACKGROUND

### HISTORY

#### Contact

Land disputes between North American Indians and European immigrants developed shortly after the arrival of the first settlers and continue to this day. The settlers found organized, self-governing communities that were using the lands and resources of this continent in a sustainable way, in harmony with nature. Many of these communities were, in some ways, more sophisticated than the so-called civilized newcomers. The government of the Five Nations Confederacy (now Six Nations), with its complicated system of checks and balances, was studied by Benjamin Franklin and used, in part, as the model for the government of the United States.<sup>1</sup> Similar examples of the sophistication of First Nations are numerous but, unfortunately, not well known.

What the Indians did not have was gunpowder, iron and steel, alcohol, and, most disastrously, any resistance to European diseases. Estimates of the population of North America prior to contact are in the vicinity of 18 million. After the arrival of the Europeans, approximately 95 per cent of North American Indians died, over 130 years, of diseases such as measles and tuberculosis.<sup>2</sup> Waves of epidemics swept the continent, leaving the First Nations decimated and vulnerable to European powers bent on colonization. The impact of disease should not be underestimated in the taking of North America.

Another important consideration in the history of Indian and settler land dealings is the huge cultural gap between the participants to the various treaties and land "sales." Although it is improper to generalize about First Nations' cultures, as they are all unique, most First Nations had no concept of land "ownership" as such. They believed that they were placed upon the land by the creator to care for the land and those things that cannot speak for themselves. How can one sell something one does not own? It would appear that First Nations more often believed they were entering into agreements to *share* the land with the newcomers.

#### The Royal Proclamation

By the mid 1700s, as the European powers fought each other for control of North America (with various Indian tribes playing strategic roles as military allies), the colonies in New

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<sup>1</sup> A.M. Gibson, *The American Indian* (Heath and Company, 1980), 580.

<sup>2</sup> Thomas R. Berger, *A Long and Terrible Shadow* (Vancouver: Douglas & McIntyre, 1991), 33.

England and New France began to expand. Problems developed over the haphazard, and often fraudulent, way in which settlers acquired land from the Indians. Things came to a head during the summer of 1763, when the Ottawa warrior Pontiac led a series of devastating raids on interior trading posts in which more than 2000 people were killed.<sup>3</sup>

Quebec had fallen in 1759, and the French had capitulated to the British at Montreal the following year. At the conclusion of the Seven Years' War, the European powers signed the Treaty of Paris in 1763. Britain gained control of most of the continent, east of the Mississippi, from Hudson Bay to the Gulf of Mexico. In response to the new situation, King George III issued the *Royal Proclamation of 1763*. That proclamation, which dealt with the administration of Britain's new lands, also set aside most of the interior of North America as Indian Territory. In addition, the *Royal Proclamation* established a procedure for the surrender of Indian lands which is still in place today (in a modified form, set out in the *Indian Act*<sup>4</sup>). That process was established to prevent the "great Frauds and Abuses . . . committed in purchasing Lands of the Indians"<sup>5</sup> by forbidding private persons from purchasing Indian land. Instead it required the following procedure:

if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; . . .<sup>6</sup>

This process effectively interposed the Crown between the settlers and the Indians by preventing the sale of Indian lands to anyone other than the Crown. It was, therefore, the beginning of the Crown's fiduciary obligations to the Indians,<sup>7</sup> and of the treaty process as well.

### Treaties

Most of the treaties in the Maritime provinces and in Quebec are "peace and friendship" treaties, more concerned with military alliance than land. There are more than 30 different treaties covering the Great Lakes basin entered into between 1763 and 1850. The prairies were settled through the "numbered" treaties, entered into between 1870 and 1921. The adherence to Treaty 9, covering most of northern Ontario, was entered into in 1929. For several reasons, including a reluctance to pay for Indian land, most of British Columbia is not covered by treaties. A modern treaty-making process commenced in British Columbia in 1992 with the creation of the British Columbia Treaty Commission. The current

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<sup>3</sup> Craig Brown, ed., *The Illustrated History of Canada* (Toronto: Lester & Orpen Dennys, 1987), 194.

<sup>4</sup> *Indian Act*, RSC 1985, c. I-5, ss. 37-41.

<sup>5</sup> *Royal Proclamation*, as set out in *The Annotated Indian Act, 1994*, ed. Donna Lea Hawley (Toronto: Carswell, 1993), 180.

<sup>6</sup> *Ibid.*, 180.

<sup>7</sup> For a detailed analysis of the Crown's fiduciary obligations to Indians, please refer to Mary Ellen Turpel's paper included in this volume.

negotiation of comprehensive claims in the Northwest Territories and the Yukon are also examples of modern treaty-making.

The Crown did well by this special process. It purchased Indian land at low value, and then resold it to speculators, who in turn sold it for a further profit. What little land had been "reserved" for the Indians pursuant to the treaties was also coveted by the settlers. Utilizing the surrender provisions of the *Indian Act*, vast tracts of land were taken away from First Nations reserves all across Canada, especially during the period from the introduction of the *Indian Act* in 1876 to the Second World War. Many people profited during this period; few (if any) were Indians:

Significant Crown revenues were generated by the purchase of Indian lands at minimal cost and subsequent resale to speculators. However, Indian lands were often improperly taken and sold; Indian moneys too often went missing or were invested in improvident schemes; treaty promises were ignored (always excepting, of course, the Indians' promise to cede the land).<sup>8</sup>

### Confederation

Prior to Confederation, Indian claims could only be advanced by petition to the Crown, with *no* right of appeal. After 1867, First Nations could do little more, except complain to their Indian agent. There were various commissions and boards, which looked into issues regarding Indian lands. Most dealt with federal-provincial jurisdictional disagreements. Some of those, like the *St Catherine's Milling*<sup>9</sup> case, ended up in the highest Court in the land (then the Judicial Committee of the Privy Council in Britain). This case was the most important Indian land rights decision in Canada for decades, even though no Indians were before the Court.

As a result of this case, the provinces of Canada obtained control of all the lands within their boundaries that the Indians had ceded by way of treaty to the federal Crown, or to the British Crown before 1867. Those treaties contained solemn promises made to the Indians regarding the right to hunt and fish and the right to continue their traditional pursuits, for "as long as the sun shines and the rivers flow." It was not long, however, before the provinces were enacting game and fish laws that abrogated treaty rights (as decisions such as *Sparrow*<sup>10</sup> have determined).

Following the First World War, returning Indian veterans began to demand justice on land issues. A growing number of court applications sought to redress the way in which Indian land had been taken. This led the federal government to amend the *Indian Act* in 1927 to make it illegal for an Indian Band to raise funds to retain legal counsel to litigate a land claim. These provisions remained in effect until 1951.

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<sup>8</sup> Indian Commission of Ontario, *Discussion Paper Regarding First Nation Land Claims* (Toronto: ICO, September 24, 1990), 6.

<sup>9</sup> *St Catherine's Milling and Lumber Company v. R.* (1888) 14 AC 46 (PC).

<sup>10</sup> *R. v. Sparrow*, [1990] 1 SCR 1075, [1990] 3 CNLR 160.

### **First Attempts at Claims Resolution Process**

After the Second World War, Canada recognized that it must address “the Indian problem.” For over 100 years, law and policy directed towards Indians had been built upon the premise that Indians were a disappearing race, doomed to extinction as a result of disease and assimilation. By this time it was becoming apparent that this premise was mistaken.

Joint committees of the Senate and the House of Commons, in 1946–48 and again in 1958–61, recommended the creation of an Indian Claims Commission. Draft legislation was prepared and tabled in 1963 and again in 1965. Like the American Indian Claims Commission, this commission would have had courtlike powers and would have been able to “hear and consider” five classes of claims.<sup>11</sup> The draft bills died on the order paper.

### **The White Paper**

In 1969 the federal government tabled a White Paper.<sup>12</sup> It maintained that aboriginal title claims were “too vague and undefined” to be dealt with. Treaty rights were to be abolished, along with the concept of a “status” or “treaty” Indian. Only *lawful obligations* of the Crown would be fulfilled, with the assistance of an Indian Claims Commissioner.

The White Paper was not well received by Indians. The backlash it sparked helped to solidify the growing Indian rights movement of the time and assisted in the development of the National Indian Brotherhood, now the Assembly of First Nations. The government backed away from most of the recommendations contained in the White Paper.

### **Development of Current Policy**

It was not until after the 1973 Supreme Court of Canada decision in *Calder*<sup>13</sup> that Canada began to take native claims seriously. In a 3-3-1 split decision, three justices found that “aboriginal title” was a legal entity that had to be addressed by Canada. Shortly thereafter, negotiations commenced on “comprehensive claims” (those claims dealing primarily with unextinguished aboriginal title). The James Bay Agreement in 1975 was the first settlement of its kind.

The Office of Native Claims (ONC) was established in 1974 to negotiate land claims settlements with First Nations. It is part of the Department of Indian Affairs and Northern Development (DIAND), and reports to the deputy minister. Over time, policies with respect to native claims were developed in a piecemeal fashion by Canada. During the 1970s and early 1980s many approaches were considered and many reports were written. In a report commissioned by and for the ONC in 1979, Gerald V. La Forest, QC (now a justice with the Supreme Court of Canada) recommended that an administrative tribunal be created

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<sup>11</sup> Bill C-123, *An Act to Provide for the Disposition of Indian Claims*, 3rd Sess., 26th Parl., 1965.

<sup>12</sup> Department of Indian Affairs and Northern Development (DIAND), [The White Paper] *Statement of the Government on Indian Policy* (Ottawa: Queen's Printer, 1969).

<sup>13</sup> *Calder v. British Columbia (Attorney General)*, [1973] SCR 313.

through legislation to deal with specific land claims (those relating to the administration of Indian land and assets and the fulfilment of treaties):

This independent body should for all practical purposes be a specialized court, but with power to adopt procedures and practices suitable to its particular functions. Its jurisdiction should extend beyond claims now enforceable in a court of law to encompass those arising out of the honourable treatment that should be accorded the Indians by the government. In addition, a number of technical rules, such as limitation periods and certain rules regarding the admissibility of evidence, should be removed or relaxed to permit substantial justice in the settlement of Indian Claims.<sup>14</sup>

The government did not establish an independent body. Instead, Canada retained the practice of party-to-party negotiations, amalgamated its various policies on land claims, and then published two booklets, one in 1981 and the other in 1982, delineating government policies and procedures for dealing with native claims. The first was *In All Fairness*, setting out the policy on comprehensive claims. The second was *Outstanding Business: A Native Claims Policy*, dealing with specific claims. Despite more than two decades of relentless criticism, both policies remain in effect today, almost unchanged.

#### LAND CLAIMS POLICY: DIFFICULTIES AND INEQUITIES

For a comprehensive examination of the problems with the 1982 policy *Outstanding Business* (the Policy), please see the September 1990 *Discussion Paper Regarding First Nation Land Claims* prepared by the Indian Commission of Ontario (printed below), and the December 1990 *First Nations Submission on Claims*, prepared by the Chiefs Committee on Claims (reprinted in ICCP 1). The following is a brief overview of the major difficulties and inequities that have been identified to date.

#### Artificial Distinction between Comprehensive and Specific Claims

From its creation, the distinction between the two types of claims has caused great controversy:

A fundamental difference between the federal government and First Nation perceptions of claims is the artificial division of federal policies into "specific" and "comprehensive" claims. Two narrowly defined policies have been developed which are inadequate to meet the needs and priorities of First Nations. Most First Nations view their claims within the greater context of constitutionally protected aboriginal and treaty rights, and their political relationship with the rest of Canada.<sup>15</sup>

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<sup>14</sup> Gerald V. La Forest, "Report on Administrative Processes for the Resolution of Specific Land Claims" (Ottawa: DIAND, 1979) [unpublished].

<sup>15</sup> Assembly of First Nations, *AFN's Critique of Federal Government Land Claims Policies* (Ottawa: AFN, August 21, 1990).

Canada has recognized difficulties with the distinction and has developed a third category, "claims of a third kind," to deal with claims that do not fit neatly into either category. The federal Liberals, in their 1993 Red Book, promised to do away with the distinction between claims.<sup>16</sup>

### **Conflict of Interest**

There are many distinct conflicts of interest inherent in the present claims policy. Most of these arise from the fact that, when a claim is brought forward, Canada is the accused, the banker, and the judge and jury. To further complicate matters, Canada stands in a fiduciary relationship to the claimants. It is difficult to imagine a better example of the meaning of the phrase "conflict of interest," as David Knoll pointed out in 1986:

[T]he most fundamental criticism of the 1982 claims policy is that Canada still remains the ultimate adjudicator of claims made against it. This has been a constant criticism of the Federal Government's native claims policy which they have repeatedly ignored. The Federal Government remains the ultimate determiner of what claims will be funded, validated and accepted for negotiation. No appeal is available except to commence an action through the Courts. There is not even the least effort to preserve the image of neutrality. This situation, more than any other, is what condemns this policy and process to be viewed as biased, arbitrary and unfair.<sup>17</sup>

Any meaningful reform of the system must address this fundamental flaw. The federal Liberals have promised to create an independent claims body. Properly structured with an appropriate mandate, it could solve some or all of the perceived problems with respect to conflict of interest.

### **Lawful Obligation**

The concept of lawful obligation originated in the 1969 White Paper and found its way into the Policy, as the central concept:

The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.<sup>18</sup>

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<sup>16</sup> Liberal Party of Canada, *Creating Opportunity: The Liberal Plan for Canada* (Ottawa: Liberal Party of Canada, 1993) [known as the Red Book].

<sup>17</sup> David Knoll, "Unfinished Business: Treaty Land Entitlement and Surrender Claims in Saskatchewan" (1986) [unpublished], 15.

<sup>18</sup> *Outstanding Business*, 20.



The policy is prepared to go "beyond lawful obligation" only in the following rather narrow circumstances:

- i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
- ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.<sup>19</sup>

"Lawful obligation" as the basis for a valid claim falls short of the test of a fiduciary, as is now set out in law, as was stated by the AFN:

federal land claims policy criteria are inconsistent with the developing law on aboriginal rights in this country. Landmark cases such as the recent *Guerin* (1984) and *Simon* (1985) decisions are ignored in the criteria for its comprehensive claims policy. . . . In *Sparrow* (1990) the Supreme Court of Canada said that Section 35 of the *Constitution Act*, 1982 is a solemn commitment to aboriginal peoples which must be given meaningful content by government legislation, practices and policies. The federal government has yet to respond in any sufficient manner to the requirements delineated in these decisions.<sup>20</sup>

The above criticism was written in August 1990. More than four years later it is still valid. The basis for the policy must be brought up to date with current law.

### **Fiduciary Obligations**

The topic of fiduciary obligations is considered at length in Mary Ellen Turpel's paper. Many critics would seem to prefer this concept, rather than "lawful obligations," as a basis for a claims policy.

### **Compensation Negotiations**

Even when a First Nation is able to convince Canada that it is owed a lawful obligation, the present process for negotiating compensation, as well as the compensation criteria themselves,<sup>21</sup> leave much to be desired. The criticisms of process and criteria include: the "discounting" of claims in ways that many believe are arbitrary; the refusal to recognize "special value" to a claimant; the way in which the negotiations are funded; the length of time the negotiations can take; "take it or leave it" offers; and the amendment of the Policy to include the concept of "technical breach" in a way that could lead one to conclude it was done to defeat a particular (expensive) claim.<sup>22</sup>

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<sup>19</sup> Ibid.

<sup>20</sup> *AFN's Critique*, 6.

<sup>21</sup> *Outstanding Business*, 30-31.

<sup>22</sup> See *ICO Discussion Paper*, 44ff, regarding the claim of the Mississaugas of the New Credit.

### Summary

A considerable body of material details the shortcomings of the present Policy and its attendant process. Nearly all of it points towards the need to broaden the basis upon which Canada accepts its responsibilities to the First Nations:

In light of the need for a satisfactory resolution for all parties, the case is argued for a broad definition of the obligations upon the federal government which are "lawful" in the truest sense of the word. This issue is by far the most complex to be dealt with in developing a new model, yet it is obviously fundamental.<sup>23</sup>

Again, most reports and papers emphasize the need for an independent body to administer or oversee the land claims process and the way in which the Policy is administered.

### THE INDIAN CLAIMS COMMISSION

For a succinct history of the Indian Claims Commission (the Commission), including Inquiries conducted and Reports submitted, please see our Annual Report, 1991-1992 to 1993-1994, issued in July 1994. Here we will give only the details regarding the creation of the Commission from the period 1990-91, in relation to the other reforms initiated during that same period.

The Commission is a product of over 200 years of frustration and the tumultuous events of 1990, including the Supreme Court of Canada decision in *Sparrow*<sup>24</sup> released in May, the blocking of the Meech Lake accord by Elijah Harper in June, the violence at Akwesasne that spring over gambling, and the "Mohawk summer" at Oka.

### 1990

The Assembly of First Nations (AFN) released a detailed critique of government land claim policies in August 1990. At a special meeting of the Tripartite Council on August 23, convened to address the crisis in Oka and the failure of negotiated solutions, the Indian Commission of Ontario (ICO) gave a commitment to government and Indian leaders to produce a discussion paper on land claims reform within 30 days. That influential paper (included in this volume) was released on September 24 and contained 38 recommendations, including the creation of an independent claims body. It also systematically detailed the problems with the 1982 policy *Outstanding Business*.

On September 25 the government announced its "Native Agenda" based on the "Four Pillars." The first was to accelerate the pace of land claim settlements so that they would all be concluded by the end of the decade. On October 10 and 11 the Minister of Indian Affairs met with 20 Indian leaders from across the country to discuss changes to the federal

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<sup>23</sup> Brad Morse, ed., *Indian Claims in Canada* (Wallaceburg: Association of Iroquois and Allied Indians, Grand Council Treaty # 3, and Union of Ontario Indians Walpole Island Research Centre, 1981), 9.

<sup>24</sup> Note 10 above.

land claim policies. A working group of Indian leaders was established, co-chaired by Chief Clarence T. (Manny) Jules of Kamloops First Nation and Harry S. LaForme, then Commissioner of the ICO. This working group became known as the Chiefs Committee on Claims (CCC) and produced the paper *First Nations Submission on Claims*, which was presented to the Minister on December 14. The *First Nations Submission on Claims* had already received support in principle at a special Chiefs assembly of the AFN, held in Ottawa on December 11. It contained 27 recommendations, including the creation of an independent claims body and the creation of a joint working group to develop policy reform.

#### **A New Federal Initiative**

After a period of negotiation, involving proposals and counter proposals between the Chiefs Committee on Claims and the Minister, the federal government announced a new initiative on specific claims on April 23, 1991, which included:

- 1 *Increased Resources:* Funds available for settlements were increased from \$15 million to \$60 million annually, and DIAND and the Department of Justice (Justice) were provided with additional staff.
- 2 *Administrative Policy Changes:* The size of claim the Minister could approve without Treasury Board authority was increased from \$1 million to \$7 million; a "fast track" process was created to deal with claims under \$500,000; no limit was placed on the number of claims that could be negotiated at one time; and legal costs of claimants were no longer subject to the review and approval of Justice lawyers.
- 3 *Pre-Confederation Claims:* The ban on pre-Confederation claims was lifted.
- 4 *Creation of the Joint Working Group:* A joint First Nation/government working group was proposed to review and make recommendations regarding the Policy and the process (the JWG will be discussed in more detail in Part II).
- 5 *Creation of the Indian Claims Commission:* On an interim basis, an independent claims body was proposed to review specific claims, to provide mediation to the parties upon request, and to provide input to the JWG on reforming the policy and process.

These reforms were considered "modest" at best and drew the following response from the AFN:

Although the above measures fall far short of establishing the independent claims resolution process called for by both First Nations and Independent observers, (indeed these initiatives will further expand the existing Specific Claims Branch and Dept. of Justice bureaucracies) the Minister maintains there will be an opportunity for the longer term policy and process issues to be dealt with through the proposed Joint Working Group.

In any event, it is obvious that the government intends to move forward on these initiatives. Therefore the First Nations must respond with a united voice and make clear to the government of Canada what is expected for the future in terms of resolving claims and land rights issues.<sup>25</sup>

### **Indian Claims Commission Created**

The government went ahead and implemented the reforms. The Indian Claims Commission (sometimes referred to as the Indian *Specific* Claims Commission by the federal government) was established by Order in Council on July 15, 1991, and Harry S. LaForme was named as Chief Commissioner. The wording of the Order in Council immediately became an issue, as it merely reiterated the wording of the Policy. It was also contrary to the recommendations of the Chiefs Committee on Claims, and the committee passed a resolution calling for "major changes."<sup>26</sup>

After a delay of one year, and much debate involving the Commission, the AFN, the CCC, the JWG, and the government, a second Order in Council was issued which amended the mandate of the Commission to its present form. The Commission is a federal Royal Commission, mandated under the *Great Seal of Canada and Part I of the Inquiries Act* to perform the following functions:

- inquire into and report on: (a) the rejection of a specific claim by the Minister; or (b) "which compensation criteria apply in negotiation of a settlement";
- provide "advice and information" to the JWG;
- submit an annual report and such other reports as the Commissioners consider required to the Governor in Council (the federal Cabinet); and
- provide mediation to the parties where both parties request it.<sup>27</sup>

The Commission is what has been referred to as a "soft adjudicative tribunal,"<sup>28</sup> like New Zealand's Waitangi Tribunal,<sup>29</sup> in that the recommendations of the Commission are not binding on the parties but are only advisory in nature. This means that at the completion of an Inquiry, the First Nation involved, and/or the government, may choose to ignore the recommendations of the Commission.

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<sup>25</sup> Assembly of First Nations, *The Proposed Federal Initiatives on Specific Claims, A Brief Appraisal in Light of the Principles of the First Nations Submission on Claims* (Ottawa, June 4, 1991).

<sup>26</sup> AFN, "Resolution," August 7, 1991.

<sup>27</sup> Orders in Council PC 1991-1329 and PC 1992-1730.

<sup>28</sup> Joseph Williams, *New Zealand's Waitangi Tribunal: An Alternate Dispute Resolution Mechanism* (Canadian Bar Association, 1988).

<sup>29</sup> See ICO, *Discussion Paper*, 78, for a discussion of the Waitangi Tribunal.

### Commissioners Named

On September 1, 1992, a third Order in Council was issued naming six additional Commissioners to the Commission. Three were selected from a list submitted by the AFN: Chief Roger Augustine, Chief of Eel Ground First Nation of New Brunswick; Dan Bellegarde, First Vice Chief with the Federation of Saskatchewan Indian Nations (FSIN); and Carole Corcoran from the Fort Nelson Indian Band in northern British Columbia, who is also a Commissioner with the BC Treaty Commission. Three Commissioners were appointed by the federal government: Charles Hamelin (who passed away on July 29, 1993); Carol Dutchshen (who resigned to take another position in May 1994); and Jim Prentice, QC, a lawyer knowledgeable and experienced in land claim matters with the Calgary firm of Rooney Prentice.

### A Change in Leadership

In February 1994 the Chief Commissioner of the Commission, Harry S. LaForme, was appointed to the Ontario Court of Justice (General Division). On March 17, 1994, Commissioners Dan Bellegarde and Jim Prentice were appointed Co-chairs of the Commission. Native businessman Aurélien Gill (former Chief of Mashteuiatsh First Nation) was appointed Commissioner by the federal government in December 1994.

For the purposes of this discussion paper it is important to note that the Commission was created as an interim step only, not as a permanent body. It was part of an overall process of reform that was to rely heavily on the recommendations of the JWG to effect substantial change to the Policy and process. The Commission was to play a role in the JWG, as set out in the Commission's Order in Council and the Protocol for the JWG:

8. Having regard to the reporting duty of the Indian Specific Claims Commission as determined by the Governor in Council, the Co-chairpersons of the Joint Working Group may request from time to time that the Chief Commissioner of the Indian Specific Claims Commission provide the Joint Working Group with such information, or attend such meetings, as may be considered necessary in its discussions.<sup>30</sup>

The Commission was established to perform two functions. The first was to provide input into the overall reform process as performed by the JWG. The second was to oversee the *existing* Policy and process, as an *interim* measure, until such time as substantial reforms were realized:

To oversee the management of the current policy we agreed to establish the Indian Specific Claims Commission to assure that claimant bands would have access to a third party to

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<sup>30</sup> Protocol for the Joint First Nations/Canada Working Group on Specific Claims, July 22, 1992.

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pursue any concerns they might have about the fairness of the *existing* process. The order-in-council establishing the commission therefore reflects the policy components and criteria of the existing policy, adjusted as agreed to provide *interim* improvements.<sup>31</sup>

The failure of the JWG (as discussed in Part II) and the subsequent lack of negotiations have prevented the Commission from advising on reform of the present system. Thus, in an attempt to fulfil this aspect of our mandate, the Commission has begun this current process. This involves the production of this discussion paper (and attached materials) so that the important issue of land claims reform can once again be addressed.

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<sup>31</sup> The Honourable Tom Siddon, Minister of Indian Affairs and Northern Development, to H.S. LaForme, Chief Commissioner, ICC, Ottawa, November 8, 1991. Emphasis added.

## PART II

# A FAILED PROCESS OF REFORM: THE JOINT WORKING GROUP

As noted in Part I, Canada proposed the creation of the Commission and the Joint Working Group at the same time, as part of an overall set of reforms. The reforms were kept modest because the government had decided to delay fundamental change until after the JWG had deliberated and made recommendations. This strategy was set out by the Minister in a letter to the National Chief in 1991:

the Chiefs' Committee on Specific Claims had accepted that only some issues could be dealt with immediately and others, especially policy issues which tend to be inherently complex, would be the subject of a serious review over the medium term. That is why the chiefs suggested, and why I agreed to, the Joint Indian/Government Working Group on Specific Claims. This group would review the criteria for both validation and compensation and whatever other policy issues members agree upon. It is the recommendations of this group as well as the joint evaluation of the Commission which will form the basis of proposals to Cabinet regarding more fundamental policy changes.<sup>32</sup>

The JWG was made up of political representatives and technical advisers from the eight AFN regions for First Nations and by three officials from DIAND and Justice for the federal government. It was co-chaired by Chief Clarence T. (Manny) Jules and John Graham, Director General, Policy Development Branch, DIAND. Its mandate was to review all aspects of the specific claims policy and process. The JWG first met in February 1992, and a protocol describing the role of the JWG and the working relationship among its members was signed in July 1992 by the National Chief and the Minister.

The JWG met a total of 13 times between February 1992 and June 1993. A wide range of issues was discussed, from the nature of a claim to the form and structure of an independent claims body. The parties retained the services of an independent facilitator, Bonita Thompson, who produced what is generally referred to as "Neutral's Draft"<sup>33</sup> (included in this volume). This document outlined the areas of agreement, and disagreement, between the parties. Progress was made in several areas. In particular, significant agreement was reached on the details of an independent claims body.

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<sup>32</sup> The Honourable Tom Siddon, Minister of Indian Affairs and Northern Development, to Ovide Mercredi, National Chief, AFN, Ottawa, November 9, 1991.

<sup>33</sup> Bonita J. Thompson, "Draft Recommendations Prepared by Neutral," June 25, 1993.

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The mandate of the JWG expired in July 1993. The parties were unable to reach agreement on an extension of the JWG's mandate, and the process ended. No recommendations were made. The AFN has made several criticisms of the JWG process, including the following:

the Working Group's mandate was unduly limited to only "specific" claims. Federal representatives were not given sufficient authority to make significant changes. Inadequate resources were provided to First Nations for their full participation, particularly at the regional level.

First Nation representatives on the Joint Working Group strongly felt that the federal representatives were more concerned with defending the current policy, rather than making fundamental and necessary changes to it.<sup>34</sup>

A letter from John Graham to Manny Jules in July 1993 clearly demonstrates that the government felt it had demonstrated significant "movement" within the JWG process in the following areas, by agreeing to the following:

1. *the development of an independent claims process* where a neutral body has real "teeth" to manage the negotiation process and where the "acceptance" decision is ultimately in the hands of independent panels with an appeal to the courts;
2. *the funding of First Nations to participate in an ongoing process as a partner with the federal government to review the operation of the independent process and to work on improvements;*
3. *the administration of research and loan funding by a body outside of the federal government;* and
4. *the removal of existing compensation criteria as a precondition to begin negotiations.*<sup>35</sup>

However, at the same time there remained 12 or 14 outstanding issues involving fundamental disagreement. Fourteen are set out in Neutral's Draft, and 12 were attached as an annex to the above letter from John Graham to Manny Jules:

1. Limitation and Laches
2. Without Prejudice
3. Negotiation Loans vs. Grants
4. Issues Revolving around the Definition of a Claim
5. Onus of Proof
6. "Technical" Legal Defences

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<sup>34</sup> AFN, "Background and Approach to Changing the Federal Claims Process," draft, May 19, 1994.

<sup>35</sup> John Graham, Director General, Policy Development Branch, DIAND, to Chief Clarence T. (Manny) Jules, Ottawa, July 9, 1993.



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7. Suspension of Limitation Periods
8. Dispossession
9. Compensation Based On Legal Principles
10. Overall Operating Costs
11. Compelling Provincial Involvement
12. Releases<sup>36</sup>

There may have been some "movement" with respect to four issues, but clearly, by the end of the JWG process, substantial areas of disagreement were still outstanding. Indeed, it would appear that there was not even agreement on what constituted a claim. The JWG process came to a close in July 1993, and since that time no specialized forum has existed for First Nations and Canada to discuss reform of land claims policies and processes.

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<sup>36</sup> Ibid., attached Annex.

## PART III

### NEXT STEPS

The federal Liberal party took office in October 1993. Prior to its election, it made a number of promises with respect to aboriginal issues generally and to land claims reform in particular. These are contained in their Red Book and in a number of important speeches and statements. They are well documented in the papers included in this volume by Mary Ellen Turpel and Art Durocher. Our concern at this point is how to begin the process of implementing these promises, promises that echo the calls for reform made by the First Nations for decades.

In the spring of 1994 the federal government agreed to provide funding for a meeting of the Chiefs Committee on Claims. That meeting was held in Winnipeg on June 1 and 2, 1994. It was chaired by the National Chief. All four Commissioners (now five) of the Indian Claims Commission were invited to speak to the assembled Chiefs regarding the Commission. The Chiefs present expressed concern that the Commission lacked "teeth," since its decisions were not binding. Also expressed was the concern that, to date, the federal government had not responded to any of the recommendations made by the Commission.<sup>37</sup> The Chiefs felt strongly that an independent body must be involved in the claims process from start to finish:

There must be an independent body involved in facilitating claims throughout the entire process, from research and development, submission of claims and implementation of settlements.<sup>38</sup>

The resolution passed at the conclusion of the meeting called for: "a bilateral forum (First Nations/Canada) to prepare recommendations on acceptable policies and processes to resolve First Nation land and resource rights issues. . . ."<sup>39</sup> The resolution also called for adequate funding of the CCC to facilitate the development of a national policy. Unfortunately this resolution could not be put before the AFN General Assembly in July 1994, and therefore has not yet received formal support.

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<sup>37</sup> The Commission received its first response from the federal government on August 5, 1994. That response was to the *Athabasca Denesuline Inquiry*, released to the parties on December 21, 1993. Responses to the *Cold Lake and Canoe Lake (Primrose Lake Air Weapons Range) Inquiries*, *Young Chipeewayan Inquiry*, *Micmacs of Gesgapegiag Inquiry*, and *Chippewas of the Thames Inquiry* were received in February and March 1995.

<sup>38</sup> AFN, "Draft Summary, Chiefs Committee on Claims Meeting," Winnipeg, June 1 and 2, 1994.

<sup>39</sup> Chiefs Committee on Claims, "Resolution," Winnipeg, June 2, 1994.

As it stands, the Commission has no knowledge of any formal negotiations or discussions taking place at this time, although both First Nations and Canada have stated their desire to overhaul the existing land claims system. How then do the parties move towards fundamental reform of both the Policy and the process? There are a number of options open to the parties at this point, including (in no particular order):

- 1 The JWG could be reconstituted and the attempt to find a consensus on reform continued.
- 2 Direct negotiations could take place between Canada and the AFN and/or the CCC.
- 3 The AFN/CCC could prepare an updated proposal on land claim reform followed either by negotiations, or by Canada preparing draft reforms based on the updated proposal.
- 4 Canada could prepare draft reforms based on the materials at present available and the Red Book promises, followed by negotiations.
- 5 Canada could take unilateral action to implement reform after a process of "consultation."
- 6 The concept of a national policy could be abandoned altogether and regional solutions pursued, perhaps based on treaties or "Nations."
- 7 Nothing is done and the present system is left in place, or minor amendments and adjustments are made from time to time.

Option 7 would lead to disaster and most likely another Oka. Option 6 has potential and may also be the "default" option: if none of the other options is pursued, then this will be. It also contains the inherent risk of a "balkanization" of the claims process and the end of national standards for claims. There is an important role for regional bodies, such as the ICO, to play in negotiations, but even the ICO recognizes the need for an independent claims body with "teeth" to make the process work.<sup>40</sup>

Option 5 runs the risk of First Nations' rejecting whatever reforms are implemented (regardless of merit), based on opposition to the process. Option 4 runs a similar risk in that any proposals prepared by Canada prior to negotiations could also be criticized more because of process than content.

Option 3 has the First Nations make the first proposal, with Canada responding to those recommendations. The AFN and the CCC would require special funding to produce the proposal, but this process should be more acceptable to First Nations than options 4 to 7.

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<sup>40</sup> ICO, *Discussion Paper*, 99.

The viability of options 2 and 1 would depend primarily upon the way in which the negotiations were structured, as well as upon the goals that were established. It is our position that there exists at present a broad consensus between First Nations and Canada on the need for at least *some* fundamental reforms, such as:

- the creation of an Independent Claims Body (ICB);
- the validation of claims by some other body (such as the ICB), so as to remove the conflict of interest that exists for Canada in the present system;
- the facilitation of claims negotiations by the ICB (or some other body like the ICO) to ensure fairness in the process;
- the need for the ICB (or some other body) to possess the authority to break impasses in negotiations regarding compensation.

It is our submission that it may not be necessary (or possible) to reach consensus on all details of fundamental reform at this time. Instead the parties could consider implementing *now* those reforms where substantial consensus exists, while simultaneously establishing a permanent process to consider ongoing reforms to the new system. This would have parallels to the reforms that were instituted in 1991 with these differences: (1) the ICB would be a truly independent claims body (not an interim body established to oversee the existing system); and (2) the body or forum established to consider ongoing reform of the system would be permanent (not established through a one-year protocol agreement as was the JWG).

Regardless of what option the parties select, this Commission believes that we have a role to play in the reform process. Our Orders in Council require us to provide advice and guidance to Canada and First Nations on how to reform and improve the present system. We can assist Canada and First Nations by providing input to the reform process. That input would be based on what we have learned by conducting Inquiries and from travelling to First Nations to hear directly from elders, and others, the problems associated with the current Policy and process. In addition, we can facilitate negotiations and provide mediation, when and if required.

Everything that this Commission has learned to date indicates that it is imperative to commence the process of reform immediately, before it is too late. The return of native land is central to any real progress on the wide range of problems that face First Nations today. Meaningful self-government, and true economic self-sufficiency, depend on an adequate land base. It is time for a fair and equitable process.